No. 12,296

IN THE

United States Court of Appeals

For the Ninth Circuit

E. R. GOOLD,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

REPLY BRIEF FOR THE PETITIONER.

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The petitioner in this proceeding has timely filed his opening brief. The respondent's brief was received by counsel for the petitioner on February 4, 1950, and this reply brief should be filed ten days thereafter per this Court's Rule 20, Par. 4.

The parties herein are in agreement upon the issues involved. Our rebuttal follows the same order of presentation as in our opening brief.

FIRST QUESTION.

Respondent's counsel have exaggerated the alleged binding effect upon the Appellate Court of findings of ultimate fact by the Tax Court. Subsequent to the amendment of section 1141(a) of the Internal Revenue Code by section 36 of the Act of June 25, 1948, petitions for review of decisions of the Tax Court have been on a par with appeals from the United States District Courts as to the authority of this Court to review the findings of ultimate fact by the Tax Court to determine (1) whether such findings are supported by substantial evidence in the primary facts appearing in the stipulations of the parties and in the oral testimony and (2) whether they are in the judgment of this Court erroneous in law. The effect of the cited amendment of section 1141(a) of the Internal Revenue Code was to restore the rules existing before the development of a contrary doctrine declared by the Supreme Court in *Dobson v. Commissioner,* 320 U.S. 489 (1943), 88 L. Ed. 248, 64 S. Ct. 239, which restored rules are exemplified in the following cases: *Wilmington Trust Co. v. Helvering,* 316 U.S. 164 (1942), 86 L. Ed. 1352, 62 S. Ct. 984; *Bogardus v. Commissioner,* 302 U.S. 34 (1937), 82 L. Ed. 32, 58 S. Ct. 61; *Commissioner v. Rainier Brewing Co.* (C.C.A. 9, 1948), 165 F. (2d) 217.

With these rules in mind, it is urged on behalf of the petitioner that this Court of Appeals look through the so-called "findings" of the trial judge and make an independent examination of the primary facts

disclosed in the stipulations, exhibits and in the testimony of the witnesses of both parties and therefrom correct those findings which are based not on facts but on surmises, suspicions and obvious misinterpretation of testimony.

One of the most glaring of such false findings is that made by the trial judge in his opinion (R. 46) quoted by the respondent (Br. 13) as to the reason behind the transfer of the partnership interest from father to son by means of a bill of sale and a note in payment for the partnership interest sold, namely that the note "was not intended by the parties to be evidence of a presently-enforceable debt arising out of a business transaction, but to be evidence of an advancement and which would serve as a means of equalizing, as between the petitioner and his sister, the share of the father's estate which he would receive upon the latter's death." That remarkable conclusion has been drawn by an inexplicable *non sequitur* from the petitioner's attempt to explain in his testimony that a gift from father to son (petitioner) would have been a preference of one child over the other but that a sale by means of which the full value of the property transferred would—either in the form of the note or in proceeds of its liquidation—remain in the father's community property estate, thus negating any preference. The petitioner did not mention anything about an advancement of his inheritance and obviously had no such notion in mind. Cf. Par. (4) of the petitioner's opening brief, p. 9. We mention this finding especially because it is a crucial point in the trial

judge's argument in support of his conclusion of ultimate fact that this transfer in question was a gift and not a sale. Such a finding, so falsely based in the testimony, has all the earmarks of one made solely to bolster a prejudgment made irrationally on the basis of personal bias. The emphasis of the respondent's brief on this false finding indicates that his counsel recognize it as essential to their case for the approval by this Court of the trial judge's conclusion.

The only other argument of any consequence on behalf of the respondent, an alleged lack of value of the petitioner's note as consideration for the transfer, disregards completely the one-half interest of the maker of the note in the partnership business transferred to him in the same transaction, an interest in a growing and profitable business, as well as the value of the petitioner's services in the same business as an income-producing factor tending to make the partnership interest increasingly valuable and to keep it that way. The petitioner, aged 31, was in his prime (R. 68), he had served his apprenticeship in his father's business for 2½ years (R. 69), and has proved his value therein. The trial judge found the fair value of his services in the business to be $10,000.00 per year (R. 42, 47), twice the amount determined by the respondent in his statutory notice of deficiency. The arguments of respondent's counsel based on an alleged lack of valuable consideration are questionable to say the least, if not actually deceptive.

The respondent's counsel have pointedly avoided in their brief any reference to the prohibition set forth

in Section 172 of the Civil Code of the State of California upon gifts of community property without the written consent of the wife (quoted in full in petitioner's brief, p. 10), and it is suggested that such avoidance of a provision of law, the disregard of which is specifically assigned as an error of the Tax Court in the petition for review (R. 64), is based on their inability to find any means of overcoming the effect of such inhibition to utterly negative the trial judge's finding that the transfer of an interest in the father's business was in fact and in law a gift. This Court's attention is again called to the testimony of one of the respondent's witnesses, Mrs. Elizabeth Goold, wife of the petitioner (R. 82 to 84) which was positive to the effect that there was no gift, and to the failure of the respondent's attorney to put his other witness on this point, the mother of the petitioner, on the stand. Cf. the argument in petitioner's opening brief in paragraphs (6) and (7), page 11.

SECOND QUESTION.

The argument of respondent's counsel upon the second question which is based upon a question of statutory construction, fails completely to come down to the merits of the question. They merely cite the previous opinions of the Tax Court, *Anna Harris et al.,* 10 T.C. 818, and *Lucilla de V. Whitman,* 12 T.C. 324, the errors in which on this point were amply demonstrated in the petitioner's opening brief. The cited affirmation of the *Whitman* decision, by C.A. 2 (in

full 50-1 U.S.T.C., Par. 9110) does not indicate in any way that the question concerning victory tax net income was raised in the petition for review. Similarly, the cited *affirmation* of the *Harris* decision was in fact a reversal of the Tax Court's decision by this Court, likewise without any indication that the instant question was at issue in the petition for review. Such alleged affirmations are of no weight whatever.

The argument for the respondent further cites a ruling of the respondent's office, I.T. 3644, C.B. 1944, p. 372, which is merely a begging of the question, and quotes a statement of the Committee on Finance (S. Rep. No. 1631, 77th Cong. 2nd Sess., p. 8; C.B. 1942-2, pp. 504, 509) which was made with reference to section 456, Internal Revenue Code, limiting the amount of the victory tax in certain cases, and not, as incorrectly stated in the respondent's brief, in explanation of section 451(a)(3), *idem.* As has been shown in the petitioner's opening brief, pp. 60 et seq., the provisions of section 451(a)(3) are clear beyond any need for external aid, and it is not apparent what bearing the finance committee's casual and erroneous remarks as to the effect thereon in explanation of an entirely different provision of the statute can have on this Court's construction of the provisions of the law according to which the petitioner has claimed a deduction of California income tax in the computation of his victory tax net income.

CONCLUSION.

In view of the failure of respondent to show error in the conclusions reached by petitioner in his opening brief, it follows that the decision of the Tax Court here under review should be modified to correct the errors assigned in the petition for review, and that judgment should be given for petitioner as prayed for.

Dated, Stockton, California,
February 10, 1950.

Respectfully submitted,
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Attorney for Petitioner.